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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

MELVIN TYLER, *Petitioner,*

v.

BURL CAIN, WARDEN, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, IOWA, KANSAS, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT AND VIRGINIA IN SUPPORT OF RESPONDENT

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
*JAMES WILLIAM BILDERBACK II
Deputy Attorney General
*Counsel of Record
300 South Spring Street
Los Angeles, California 90013
Telephone: (213) 897-2049
Counsel for Amici Curiae

(Additional counsel listed inside cover)

BEST AVAILABLE COPY

BILL PRYOR
Attorney General of Alabama
State House
11 South Union Street, Suite 325
Montgomery, Alabama 36130

BRUCE M. BOTELIO
Attorney General
State of Alaska
P.O. Box 110300
Juneau, Alaska 99811-0300

KEN SALAZAR
Attorney General
State of Colorado
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington, Delaware 19801

ROBERT A. BUTTERWORTH
Attorney General of Florida
Office of the Attorney General
The Capitol-PL-01
Tallahassee, Florida 32399-1050

JAMES E. RYAN
Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

THOMAS J. MILLER
Attorney General
State of Iowa
Hoover State Office Building
Des Moines, Iowa 50319

CARLA J. STOVALL
Attorney General
State of Kansas
120 SW 10th, 2nd Floor
Topeka, Kansas 66612-1597

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65101

MIKE MCGRATH
Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401

DON STENBERG
Nebraska Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509

FRANKIE SUE DEL PAPA
Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

PATRICIA A. MADRID
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

ELIOT SPITZER
Attorney General
of the State of New York
The Capitol
Albany, New York 12224

BEST AVAILABLE COPY

WAYNE STENEHJEM
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, North Dakota
58505-0040

BETTY D. MONTGOMERY
Attorney General
State of Ohio
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, Oklahoma 73105-4894

HARDY MYERS
Attorney General
1162 Court St NE
Salem, Oregon 97310

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

CHARLES M. CONDON
Attorney General
of the State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

MARK BARNETT
Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501-5070

PAUL G. SUMMERS
Attorney General and Reporter
425 Fifth Avenue North
Nashville, Tennessee 37248

MARK L. SHURTLEFF
Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

WILLIAM H. SORRELL
Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001

MARK L. EARLY
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

QUESTION PRESENTED

In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held that a Louisiana reasonable doubt instruction did not comply with the constitution. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that *Cage* error is a structural defect in a trial. Is the rule in *Cage*, as well as any other rule identifying a new structural defect, a watershed rule of criminal procedure exempt from the general prohibition on the retroactive application of new rules of criminal procedure to cases on collateral review in federal court under *Teague v. Lane*, 489 U.S. 288 (1989)?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-5961

MELVIN TYLER, *Petitioner,*

v.

BURL CAIN, WARDEN, *Respondent.*

INTEREST OF AMICI CURIAE

All decisions of this Court concerning habeas corpus applications filed pursuant to Section 2254 of Title 28 of the United States Code are of interest to Amici, as Amici are responsible for defending presumptively valid state court judgments against federal habeas corpus challenges. Petitioner's argument in this case would substantially broaden the scope of the exceptions to the rule against the retroactive application of "new rules" of criminal procedure in section 2254 cases, and would thereby undermine important interests of comity and finality. Amici's interests will therefore be substantially affected by the resolution of this issue. This brief is submitted in support of Respondent by Amici through their Attorneys General in accordance with Rule 37.4 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

Under *Teague v. Lane*, 489 U.S. 288 (1989), a state convict seeking federal collateral relief may not take advantage of "new rules" of criminal procedure. One of the two exceptions to this

anti-retroactivity doctrine, the one at issue here, is for "watershed rules" of criminal procedure. Petitioner proposes that all new rules identifying errors that would be deemed "structural", and therefore exempt from normal harmless-error review, are necessarily watershed rules of criminal procedure. Amici submit that, because there are important and functional distinctions between watershed rules of criminal procedure and rules identifying structural defects, this Court should reject Petitioner's proposal that the two concepts be conflated.

The issue of the connection, if any, between "structural" defects and "watershed" rules in this case arises from two decisions of this Court regarding the need to instruct the jury on the prosecution's burden of proof "beyond a reasonable doubt." In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held that a Louisiana reasonable-doubt instruction did not comply with the federal constitution. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court ruled that giving the instruction constituted a structural defect in the trial, so that a defendant need make no showing of prejudice to gain relief. Petitioner argues *Sullivan's* identification of *Cage* error as a structural defect compels the conclusion that the rule identifying such error is a watershed rule of criminal procedure.

Petitioner's retroactivity argument is based upon a flawed premise. Cases identifying structural defects are analytically distinct from those identifying watershed rules of criminal procedure. Structural defects are principally identifiable as errors for which no specific prejudice need be shown before relief becomes available due to the practical difficulty of assessing prejudice from such errors. Watershed rules, by contrast, must both greatly promote accuracy and alter our understanding of some bedrock principle; and violation of such rules may be amenable to harmless error analysis. Classifying an error as "structural" for harmless-error purposes need neither promote accuracy, nor alter our understanding of some bedrock principle of criminal procedure.

A decision equating rules identifying structural defects

with watershed rules of criminal procedure would impose a large burden on the States. The lower federal courts have identified at least twenty-nine types of errors in criminal cases as structural defects, with the Ninth Circuit Court of Appeals alone having identified eleven. This large new group of rules clearly exceeds what this Court contemplated in *Teague* when it stated that only a small core of rules, most of which had already been discovered, would fall within the watershed rule exception. Further, an examination of many of the rules reveals that they do not rise to the level of importance this Court was contemplating when it announced the watershed-rule exception in *Teague*.

The instant case provides an excellent example of a structural error that does not fulfill this Court's definition of a watershed rule of criminal procedure. *Cage* and *Sullivan* proceed from established and uncontroversial principles of law. While the precise holdings of the cases were not dictated by precedent, neither *Cage* nor *Sullivan* altered the underlying principles they were based upon. This Court's explanation of its holdings in those decisions undermines any claim that the decisions intended to, or in fact did, alter our understanding of the bedrock principles fundamental to the integrity of a criminal trial.

That the rule alters our understanding of some bedrock principle is an essential component of a watershed rule of criminal procedure. Both Petitioner's argument and the cases upon which he relies either misunderstand or simply ignore this requirement. For this reason, they erroneously conclude that *Cage* and *Sullivan* announced watershed rules of criminal procedure.

ARGUMENT

RULES IDENTIFYING STRUCTURAL DEFECTS ARE DIFFERENT FROM WATERSHED RULES OF CRIMINAL PROCEDURE

Petitioner asserts that all "structural defects," as defined in *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), are "watershed rules of criminal procedure" within the meaning of *Teague v. Lane*, 489 U.S. at 310. (Brief for Pet'r at 25.) Petitioner notes that in *Sullivan v. Louisiana*, 508 U.S. at 279-83, this Court held that (mis)instructing the jury on reasonable doubt with the instruction condemned in *Cage v. Louisiana*, 498 U.S. 39 , is a structural defect. (Brief for Pet'r at 24.)[1/] Thus, Petitioner automatically concludes, *Teague* does not bar application of the *Cage* rule to his collateral review case. Petitioner's argument, if adopted, would exempt all structural defects from *Teague's* sweeping prohibition on the retroactive application of new rules of criminal procedure to cases on collateral review. (Brief for Pet'r at 28.)

Rules identifying "structural defects" and "watershed rules of criminal procedure," however, are distinct. The language this Court has used to describe the concepts demonstrates that they are not, as Petitioner asserts, "essentially identical." (Brief for Pet'r at 25.) The bases for these two rules are analytically distinct, and the rules serve different purposes. Further, the liberality with which the circuit courts have identified new structural defects militates against conflating the two doctrines. In this case, a proper analysis of *Cage* and *Sullivan* reveals they

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1. Amici note that the basis for this Court's conclusion in *Cage* (though not the holding) was expressly overruled in *Estelle v. McGuire*, 502 U.S. 62 (1991). The case articulating the current "rule" for analyzing claims of erroneous reasonable doubt instructions is *Victor v. Nebraska*, 511 U.S. 1 (1994). Accordingly, unless Petitioner can demonstrate the instant case is factually identical to *Cage*, it is the rule in *Victor* which would control, to the extent any such rule should be given retroactive effect.

do not fit the definition of a watershed rule of criminal procedure.

INTRODUCTION

I.

THE "WATERSHED RULES OF CRIMINAL PROCEDURE" EXCEPTION IN *TEAGUE V. LANE*

Recognizing the importance of finality and comity to our criminal justice system, a plurality of this Court has held that state prisoners seeking federal collateral relief from their convictions may not base their claims upon new constitutional rules of criminal procedure. *Teague v. Lane*, 489 U.S. at 310. In deference to state-court judgments, this Court allowed only two narrow exceptions to its non-retroactivity doctrine.

The first exception involves the rare instance in which a new rule places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 307, quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part, dissenting in part). This exception has no application to the instant case.

The second, "even more circumscribed," exception is for "watershed rules of criminal procedure . . . ." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997), citing *Teague*, 489 U.S. at 311. In defining what constitutes a "watershed rule," *Teague* combined two concepts developed by Justice Harlan; the first in his concurring and dissenting opinion in *Mackey*, 401 U.S. 667, the other in his dissenting opinion in *Desist v. United States*, 394 U.S. 244 (1969).

From *Mackey*, this Court incorporated the principle that retroactive application should be afforded to those rules that "'are "implicit in the concept of ordered liberty . . . ."' [Such

rules] properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311, quoting *Mackey*, 401 U.S. at 693. From *Desist*, this Court extracted the principle that "'"new" constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.'" *Teague*, 489 U.S. at 312, quoting *Desist*, 394 U.S. at 262. These two concepts, taken together, define the "watershed rule" exception to *Teague's* prohibition on the retroactive application of new rules. 489 U.S. at 312; *Sawyer v. Smith*, 497 U.S. 227, 229 (1990).

Teague suggested the historic stature of watershed rules:

> [S]uch rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus - that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods."

489 U.S. at 313, quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting). *Teague* specifically referred to the discussion in *Mackey* regarding the right to counsel at trial. 489 U.S., at 311-12. This Court has subsequently reiterated that the rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is the "paradigmatic example of a watershed rule of criminal procedure." *Gray v. Netherland*, 518 U.S. 152, 170 (1996), citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

While "the precise contours of this exception may be difficult to discern," *Saffle v. Parks*, 494 U.S. at 495, the watershed rule exception "is clearly meant to apply only to a small core of rules . . . ." *Graham v. Collins*, 506 U.S. 461, 478 (1993). *Teague* cautioned that it is "unlikely that many such components of basic due process have yet to emerge." 489 U.S. at 313.

Since *Teague*, this Court has identified no previously unknown watershed rules of criminal procedure. See *O'Dell v. Netherland*, 521 U.S. at 167; *Lambrix v. Singletary*, 520 U.S. 518, 539-40 (1997); *Gray v. Netherland*, 518 U.S. at 170; *Goeke v. Branch*, 514 U.S. 115, 120 (1995); *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994); *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993); *Graham v. Collins*, 506 U.S. at 477-78; *Sawyer v. Smith*, 497 U.S. at 241-45; *Saffle v. Parks*; 494 U.S. at 495; *Butler v. McKellar*, 494 U.S. 407, 411 (1990).

II.

STRUCTURAL DEFECTS AS DEFINED IN *ARIZONA V. FULMINANTE*

In *Arizona v. Fulminante*, 499 U.S. at 307-09, this Court held that there are two basic types of error that might affect a criminal trial: "'trial error' – error which occurred during the presentation of the case to the jury," and "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."

The nature of structural errors is such that it is impossible to meaningfully assess their prejudicial effect. *Fulminante*, 499 U.S. at 309. Accordingly, this Court held that once structural error has been found, a conviction can be reversed without any additional showing of prejudice. *Fulminante*, 499 U.S. at 309-10.

This Court has identified a number of specific structural defects: a biased trial judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)); denial of a public trial (*Waller v. Georgia*, 467 U.S. 39 (1984)); denial of the right to self-representation (*McKaskle v. Wiggins*, 465 U.S. 168 (1984)); and racial discrimination in selection of a grand jury (*Vasquez v. Hillery*, 474 U.S. 254 (1986)). *See Neder v. United States*, 527 U.S. 1, 8 (1999) Further, this Court has held that the denial of the right to have

a district judge (rather than a magistrate judge) preside over jury selection is a structural defect. *Gomez v. United States*, 490 U.S. 858, 876 (1989).

Finally (and most important for the purposes of the instant case), this Court held in *Sullivan v. Louisiana*, 508 U.S. 275, that a jury instruction that diluted the burden of proof to below "beyond a reasonable doubt" was a structural defect in the trial and thus not amenable to harmless error analysis.

III.

WATERSHED RULES AND RULES CORRECTING STRUCTURAL DEFECTS ARE NOT IDENTICAL

A comparison of this Court's discussions regarding rules identifying structural defects and watershed rules of criminal procedure reveals that they cannot be rationally characterized as "identical."

The test for determining whether a rule should be considered watershed is in two parts: whether the new rule significantly enhances the accuracy of trials, and whether the new rule alters our understanding of the bedrock principles upon which trials are conducted. *Teague*, 489 U.S. at 311-12. Structural defects, by contrast, are defined primarily by their amenability to harmless error analysis. *Fulminante*, 499 U.S. at 309. These categories are not mutually exclusive. However, there are rules that clearly fulfill one definition or the other, but not both.

A misreading of *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993), might have caused Petitioner, and several circuit courts, to inappropriately conflate the concepts of a watershed rule and a rule identifying a structural defect. In *Abrahamson*, 507 U.S. at 629-30, this Court stated that denial of counsel under *Gideon v. Wainwright*, 372 U.S. 335, was a structural defect. As previously noted, this Court has repeatedly held out

Gideon as the paradigmatic example of a watershed rule of criminal procedure. *Gray v. Netherland*, 518 U.S. at 170, *Saffle v. Parks*, 494 U.S. at 495, *Teague*, 489 U.S. at 311-12 That it is also a structural defect might have tempted Petitioner and the circuit courts to indulge in a classically flawed syllogism: that because at least one rule fulfills both definitions, all rules fulfilling either definition necessarily fulfill both.

The flaw in this reasoning is revealed by another example this Court identified as illustrative of a watershed rule: a "conviction . . . based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313. In *Fulminante*, however, this Court specifically held that admission of a coerced confession is trial error, subject to harmless error analysis. 499 U.S. at 310. *Fulminante* and *Teague* thus compel the conclusion that a watershed rule of criminal procedure can contemplate "trial" rather than "structural" error.

Other cases identify structural defects that would fail to fulfill the criteria defining watershed rules. In *Neder v. United States*, 527 U.S. at 8, citing *McKaskle v. Wiggins*, 465 U.S. at 177, this Court held that denial of the right of self-representation is a structural error. However, *McKaskle's* rejection of the application of harmless-error analysis to the denial of the right of self-representation was explicitly predicated upon the recognition that self-representation rendered the trial *less* accurate: "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." *McKaskle*, 465 U.S. at 177 n.8. Accordingly, the rule discussed in *McKaskle* fails the first prong of the *Teague* test for watershed rules: that they "significantly improve the pre-existing fact-finding procedures." *Teague*, 489 U.S. at 312. This structural defect thus clearly would fail the watershed rule analysis.

In *Teague*, this Court articulated very clear criteria for

determining whether a rule should be considered watershed. In *Fulminante*, this Court articulated very clear criteria for determining whether a defect should be considered structural. Those criteria are different. Petitioner's argument is based upon the fundamentally flawed premise that the criteria for identifying structural defects and those for watershed rules of criminal procedure are "essentially identical." As demonstrated above, they are not. Accordingly, Petitioner's argument should be rejected.

IV.

HOLDING THAT ALL RULES IDENTIFYING STRUCTURAL DEFECTS ARE WATERSHED RULES OF CRIMINAL PROCEDURE WOULD IMPOSE AN UNDUE BURDEN ON THE STATES

Additionally, this Court should refrain from conflating rules identifying structural defects with watershed rules of criminal procedure because to do so would greatly and unjustifiably burden the States. This Court has held that there are only a "small core of rules" that qualify as watershed rules of criminal procedure. *Graham v. Collins*, 506 U.S. at 478 . Further, *Teague* stated that it is "unlikely that many such components of due process have yet to emerge." 489 U.S. at 313. If Petitioner's analysis were adopted, however, there would be recognized in the federal courts no less than twenty-nine new primary and central procedures implicit in the concept of ordered liberty that properly alter our understanding of the bedrock procedural elements fundamental to the integrity of a criminal proceeding. *Teague*, 489 U.S. at 307, 311; *Sawyer v. Smith*, 497 U.S. at 229; *Saffle v. Parks*, 494 U.S. at 495. Such a result is plainly inconsistent with the cautionary language in *Teague*, and must therefore be avoided.

Lower federal courts, unfettered by the strong language from *Teague* regarding the paucity of undiscovered watershed rules of criminal procedure, have purported to identify at least twenty-nine structural defects,[2] all of which would be exalted to the status of watershed rules of criminal procedure should this Court adopt Petitioner's proposed rule.

Among those rules are many which seem to be most unlikely candidates for the small core of watershed rules. In *United States v. Ramos Torres*, 187 F.3d at 914, the Eighth Circuit held that instructing the jury on a count that was dismissed was a structural defect. In *United States v. McFerron*, 163 F.3d 956, the Sixth Circuit held that erroneously denying a defendant's exercise of a peremptory challenge was a structural defect. In *Dyer v. Calderon* , 151 F.3d at 973-79 the Ninth Circuit held it was a structural defect to seat a juror who had misled the court regarding her experiences as the relative of a murder victim. In *Mach v. Stewart*, 137 F.3d at 633-34, the Ninth Circuit held that it was a structural defect in a sexual

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2. *United States v. Ramos Torres*, 187 F.3d 909, 914 (8th Cir.) *cert. denied*, 528 U.S. 1055 (1999); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998); *McGurk v. Stenberg*, 163 F.3d 470, 474-75 (8th Cir. 1998); *Henderson v. Frank*, 155 F.3d 159, 171 (3d Cir. 1998); *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998); *Mach v. Stewart*, 137 F.3d 630, 633-34 (9th Cir. 1997); *Tankleff v. Senkowski*, 135 F.3d 235, 240 (2d Cir.1998); *United States v. Hay*, 122 F.3d 1233, 1236 (9th Cir. 1997); *Mejia-Paiz v. INS*, 111 F.3d 720, 727 (9th Cir. 1997); *United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996); *United States v. DiRico*, 78 F.3d 732, 737-38 (1st Cir. 1996); *Myers v. Johnson*, 76 F.3d 1330, 1338 (5th Cir. 1996); *United States v. Johnson*, 71 F.3d 139, 144 (4th Cir. 1995); *Harmon v. Marshall*, 69 F.3d 963, 966 (9th Cir. 1995); *Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995); *United States v. Salemo*, 61 F.3d 214, 221-22 (3d Cir.1995); *Riley v. Deeds*, 56 F.3d 1117, 1121 (9th Cir.1995); *United States v. Mohammad*, 53 F.3d 1426, 1438-39 (7th Cir.1995); *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1478 (9th Cir. 1994); *United States v. Colon-Pagan*, 1 F.3d 80, 81 (1st Cir. 1993); *Suniga v. Bunnell*, 998 F.2d 664, 670 (9th Cir.1993); *Hays v. Arave*, 977 F.2d 475, 479-80 (9th Cir.1992); *Guam v. Marquez*, 963 F.2d 1311, 1315 (9th Cir.1992); *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992); *Delgado v. Rice*, 67 F. Supp. 2d 1148, 1166 (C.D.Cal. 1999); *Smalls v. Batista*, 6 F.Supp.2d 211, 222-23 (S.D.N.Y. 1998); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1524 (W.D. Mo. 1996); *Oses v. Massachusetts*, 775 F. Supp. 443, 458-59 (D. Mass. 1991).

assault trial when, during voir dire, the venire heard a prospective juror say several times, in response to questions put to her, that in her experience as a social worker sexual assault had been confirmed every time there had been a complaint. In *United States v. Noushfar*, 78 F.3d at 1444, the Ninth Circuit held that allowing a jury to review tapes that had not been played in open court was a structural defect. In *Bland v. California Dep't of Corrections*, 20 F.3d at 1478, the Ninth Circuit held that a trial court's failure to exercise its discretion and inquire into the basis for a defendant's desire to substitute counsel was a structural defect. While the defects identified by the lower courts as structural involve matters that might have been of importance to those cases, it is an exaggeration to state that rules correcting those defects are fundamental to ordered liberty.

This Court has recognized that limits on the exercise of federal habeas corpus relief to state prisoners are necessary to avoid "profound societal costs." *Calderon v. Thompson*, 523 U.S. 538, 539 (1998). This limitation is based upon the States' compelling interest in the finality of convictions. "Finality is essential to the criminal law's retributive and deterrent functions ...." *Id.* "Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the powerful and legitimate interest in punishing the guilty." *Id.* (internal quotes omitted).

These interests would be poorly served if this Court were to issue a ruling forcing the States to give full retroactive effect to all of the rules involving errors identified by the lower courts as "structural." Further, those rules would then necessarily become available to post-finality prisoners, (and, depending upon the disposition of the first issue presented in the instant case, regardless of the number of previous federal petitions filed). Petitioner's proposed rule would thus fundamentally undermine *Teague* itself, by creating a broad new category of

rules which must be given retroactive effect.

Elevating the status of rules identifying structural defects to the equivalent of watershed rules of criminal procedure would have profound consequences on the administration of justice. The sheer number of new watershed rules which would be created is fundamentally inconsistent with the notion in *Teague* that there are only a small core of such rules, few, if any, of which have yet to emerge. Accordingly, this Court should refrain from characterizing rules identifying structural defects and watershed rules of criminal procedure as identical.

V.

THIS COURT'S DECISIONS IN *SULLIVAN V. LOUISIANA* AND *CAGE V. LOUISIANA* IDENTIFIED A STRUCTURAL DEFECT THAT DID NOT ALTER OUR UNDERSTANDING OF THE BEDROCK PROCEDURAL ELEMENTS ESSENTIAL TO A FAIR TRIAL

Petitioner says he can demonstrate that the decision in *Cage v. Louisiana* is a "new rule" under *Teague* and involves a structural defect under *Fulminante*. Thus, he contends, the decision in *Cage* must necessarily be a watershed rule of criminal procedure exempt from *Teague's* general non-retroactivity doctrine. Petitioner's argument, at best, overlooks an essential element of the test for a watershed rule: such a rule must alter our understanding of the bedrock principles essential to a fair trial. Because that element is missing not only from petitioner's analysis, but also from the rule articulated in *Cage*, it cannot be considered a watershed rule.

Cage held that an instruction equating reasonable doubt with "grave uncertainty" and "actual substantial doubt," when coupled with the requirement of "moral certainty,"

misdescribed reasonable doubt. 498 U.S. at 40. *Sullivan* held that use of the instruction condemned in *Cage* constituted a structural defect in the trial. *Sullivan*, 508 U.S. at 282.

Petitioner argues that *Cage* and *Sullivan* promote the accuracy and fairness of trials. Because an impact on accuracy and fairness is also necessary to finding a rule to be "watershed," Petitioner concludes that *Sullivan's* holding that *Cage* identified a structural error compels the conclusion that *Sullivan* and *Cage* announced a watershed rule.

Petitioner's analysis, however, essentially ends there. While Petitioner acknowledges the "fundamental fairness" prong of the watershed rule analysis, he misunderstands its place in the analysis. The question is not whether the rule simply involves an issue affecting "fundamental fairness"; the new rule must also "alter[s] our understanding of the bedrock principles" essential to fundamental fairness. While the criticism of the reasonable doubt instruction at issue in *Cage* and *Sullivan* is predicated upon an important constitutional concern, it is overstating the holdings in those cases to claim that they have somehow altered our understanding of whether it is necessary to properly instruct juries on the principle of reasonable doubt. That principle was well-established long before *Cage* and *Sullivan*. *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979); *In re Winship*, 397 U.S. 358 (1970).

This Court stated in *Cage*, "The issue before us is whether the reasonable-doubt instruction in this case complied with *Winship*." 498 U.S. at 40. Amici here do not dispute that the ruling in *Cage* - that the instruction in question did not comply with *Winship* - was not "dictated by precedent," in the sense that all reasonable judges would have agreed that the rule was "compelled" by pre-existing law, and thus *Cage* should be considered a "new rule" within the meaning of *Teague*. *Saffle v. Parks*, 494 U.S. at 488. However, the bedrock principle underlying *Cage* was in no way altered. Before *Cage*, it was essential that juries be properly instructed on reasonable doubt. *Cage* did nothing to alter our understanding of that principle.

Cage's own articulation of the question demonstrates this. The issue presented was not whether the reasonable doubt instruction comported with fundamental constitutional concerns previously unexplored by this Court. Rather, it was simply a question of whether particular language in a particular instruction complied with the principle articulated in *Winship* twenty years earlier. *Cage*, 498 U.S. at 40.

Put simply, the bedrock principle prior to *Cage* was that a jury must be properly instructed on the question of reasonable doubt. Following *Cage*, the principle was the same. No new fundamental principle emerged from *Cage*.

Nor did this Court's statements in *Sullivan v. Louisiana* effect a crucial turning point in our understanding of a bedrock principle of criminal procedure. This is best illustrated by the analysis *Sullivan* used to arrive at its holding: "It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Sullivan*, 508 U.S. at 278. A rule that is based upon a "self-evident" principle hardly comports with *Teague's* requirement that a watershed rule alter our understanding of some bedrock principle.

In fact, the fairest reading of *Sullivan* is that it has not affected our understanding of what constitutes error in a reasonable doubt instruction at all. Rather, *Sullivan* only instructed "to which category the present error belongs." 508 U.S. at 279. A ruling assigning an error to one or another category does not invoke the historical significance of a bedrock principle implicit in ordered liberty. And even on the question of which category *Cage* error belongs to, *Sullivan* broke no significant new ground. As this Court observed, "Once the proper role of an appellate court engaged in the *Chapman*[*v. California*, 386 U.S. 18 (1967),] inquiry is understood, the illogic of harmless-error review in the present case becomes evident." *Sullivan*, 508 U.S. at 280. Again, an "evident" rule cannot fairly be said to affect a crucial change in our understanding of the law.

To the extent *Sullivan* "alters our understanding" of anything, it is of the proper ambit of the *Chapman* harmless error test. A review of this Court's analysis of the *Chapman* issue reveals that there, too, no new principle was articulated. Rather, this Court determined the question by reference to a well-settled principle: that a jury verdict is indispensable. *Sullivan*, 508 U.S. at 279-80, citing, inter alia, *Rose v. Clark*, 478 U.S. 570, 578 (1986). This Court's discussion of the ambit of *Chapman* in the *Sullivan* decision did not articulate a watershed rule of criminal procedure.

Similarly, the language used in *Sullivan* in discussing the *Fulminante* analysis reveals this Court was not altering the bedrock principles upon which trials are conducted. Again, Amici submit that a rule about the scope of harmless error review does not rise to the level of signifance necessary for a watershed rule of criminal procedure. Further, the *Fulminante* analysis is premised upon the "self-evident" principle that a jury that misunderstands the burden of proof cannot fairly be said to be a jury at all. *Sullivan*, 508 U.S. 278, 281. The Court concluded that such an error "is certainly" and "unquestionably" structural under pre-existing authority. 508 U.S. at 281-82. Once again, this Court's language reveals that it was relying on well-settled principles to arrive at its decision. Under such circumstances, the watershed rule exception is not available.[3/]

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3. The cases upon which Petitioner relies to support his conclusion that *Sullivan* and *Cage* announced a watershed rule are similarly flawed. *Nutter v. White*, 39 F.3d 1154, 1157 (11th Cir. 1994), and *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994), acknowledge the "alter our understanding" requirement in discussing the requirements for a watershed rule, but nowhere state how the requirement was fulfilled. Other cases discussing the issue have either simply accepted the holdings of these cases uncritically, or ignored the "alter our understanding" requirement all together. *E.g.*, *West v. Vaughn*, 204 F.3d 53, 59 (3d Cir. 2000); *Gaines v. Kelly*, 202 F.3d 598, 604-05 (2d Cir. 2000); *Morris v. Cain*, 186 F.3d 581, 585 (5th Cir. 1999); *In re Smith*, 142 F.3d 832, 835 (5th Cir. 1998)); *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir. 1997); *Schneider v. Day*, 73 F.3d 610, 611 (5th Cir. 1996); *Harmon v. Marshall*, 69 F.3d 963, 967 (9th Cir. 1995); *Gaston v. Whitley*, 67 F.3d 121, 122 (5th Cir. 1995).

This Court has reserved the term "watershed" for rules that have somehow substantially changed our understanding of the principles fundamental to the integrity of our criminal justice system. This Court's repeated use of *Gideon* as the paradigm of a rule that fulfills not only the "accuracy" requirement, but also the "alter our understanding" requirement of the *Teague* watershed rule exception, demonstrates the centrality of the latter requirement to the analysis. Prior to *Gideon*, this Court had specifically held that indigent state court defendants did not have a constitutional right to appointed counsel in criminal cases. *Gideon*, 372 U.S. at 337-39, citing *Betts v. Brady*, 316 U.S. 455 (1942). Following *Gideon*, it became mandatory that every person facing trial for a serious crime be provided a lawyer. 372 U.S. at 344. This dramatic and fundamental shift in the Court's attitude toward a basic trial right, representing a clear break with the state of the law prior to the decision, altered our understanding of a bedrock principle.

Further, *Gideon* is instructive on the relative historical importance attached to pronouncements of new bedrock principles. *Gideon* represented a fundamental shift in this Court's view of the application of the Sixth Amendment to the States. The relatively prosaic holdings of *Cage* and *Sullivan* are simply not as significant to our understanding of basic liberty as was *Gideon*. *Cage* and *Sullivan* criticized a specific instruction, used in only a portion of the criminal trials in a single state. By contrast, *Gideon* imposed upon every state a requirement that attaches to every trial for a serious crime. The decisions in *Cage* and *Sullivan* do not enjoy the preeminent position in the pantheon of constitutional rights related to the conduct of criminal trials required before a rule can be considered watershed.

The language that this Court used to discuss the principles at issue in *Cage* and *Sullivan* fatally undermines Petitioner's

claim that those decisions, whether read separately or together, articulated a watershed rule of criminal procedure. Accordingly, application of the rule announced in those cases to Petitioner's claim would be barred under *Teague's* general prohibition on the retroactive application of new rules of criminal procedure to final cases on collateral review, even if it qualified as a second petition.

CONCLUSION

For the foregoing reasons, this Court's prior holding in *Sullivan*, that the error in giving an unconstitutional reasonable doubt instruction constitutes a structural defect, does not compel the conclusion that *Cage* articulated a watershed rule of criminal procedure, exempt from *Teague's* general prohibition on retroactive application of new rules to cases on collateral review. Accordingly, this Court should affirm the decision of the Fifth Circuit denying Petitioner relief.

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Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

DAVID P. DRULINER
Chief Assistant Attorney General

CAROL WENDELIN POLLACK
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Attorney General

* JAMES WILLIAM BILDERBACK II
Deputy Attorney General
*Counsel of Record

Counsel for Amici Curiae

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